Filed 9/25/01

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. TRYNUN PATTERSON, Defendant and Appellant.	B143582 (Super. Ct. No. NA040726)

APPEAL from a judgment of the Superior Court of Los Angeles County. Charles D. Sheldon, Judge. Modified and affirmed.

Athena Shudde, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, David P. Druliner, Chief Assistant Attorney General, Carol Wendelin Pollack, Senior Assistant Attorney General, Susan D. Martynec and Rori M. Ridley, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of the Discussion, subsection A of section 1, and sections 2 through 4.

Appellant Trynun Patterson appeals the judgment following his convictions for robbery and first degree murder. After review, we modify the sentence, and as modified, we affirm. In the published portion of our opinion, we apply the recent decision in *Atwater v. City of Lago Vista* (2001) 532 U.S. 318 [121 S.Ct. 1536], and hold that a custodial arrest for a fine-only misdemeanor offense, even if it violates California law, does not require the suppression of evidence obtained as a product of the arrest.

PROCEDURAL AND FACTUAL BACKGROUND

In accord with the usual rules of appellate review, we state the facts in the light most favorable to the judgment. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) On May 3, 1999, appellant Trynun Patterson and three others robbed a jewelry and music store in Long Beach. During the robbery, one of appellant's accomplices shot and killed the store's owner, Gary Kim. Two days later, police arrested appellant for possession of less than one ounce of marijuana. Although not yet suspected of the robberies and murder, he was interviewed by homicide detectives to see if he knew anything about the crimes. After talking with the detectives for almost six hours, he fully confessed.

Appellant was charged by information with the robbery and murder of Gary Kim (Pen. Code, §§ 187, subd. (a), 211) (counts 1 & 2), and the special circumstance of robbery-murder (Pen. Code, § 190.2, subd. (a)(17)). He was also charged with robbing a store employee, Jenny Kim (Pen. Code, § 211) (count 3), and with conspiracy to commit robbery (Pen. Code, §§ 182, subd. (a)(1), 211) (count 6). A jury convicted him of the robbery and first degree felony-murder of Gary Kim, second degree robbery of Jenny Kim, and conspiracy to commit robbery. The court sentenced him to life without possibility of parole plus four years for the murder of Gary Kim. It also imposed two concurrent terms of seven years for the robberies of Gary Kim and Jenny Kim. Finally,

it imposed a concurrent three-year term for conspiracy to commit robbery. This appeal followed.[1]

DISCUSSION

1. Motion to Suppress Physical Evidence and Confession

Based on evidence from the crime scene, Long Beach police quickly determined that a man named Kenny Buckner was one of the robbers. Having identified Buckner, police planned to arrest him, but wanted the arrest to be inconspicuous so as not to alert his co-perpetrators. Accordingly, they placed him under surveillance.

Two days after the murder, detectives saw Buckner leaving a residence with appellant, who police had not yet identified as a suspect. Buckner and appellant entered a car, and appellant drove them away. After a few blocks, appellant stopped the car, and Buckner got out to talk to a pedestrian. Appellant sat in the car and rolled what appeared to be a marijuana cigarette. He smoked it while waiting for Buckner. When Buckner returned to the car, appellant drove on. The surveillance team then instructed uniformed officers to make a traffic stop of the vehicle.

Noticing appellant's car was missing a rear view mirror, the patrol officers pulled the vehicle over.[2] As the officers approached appellant's car, one smelled marijuana. He asked permission to search the car, to which appellant said "sure." The officer seized a partial marijuana cigarette in the ashtray and a small baggie containing less than an ounce of marijuana. The officers arrested appellant for possession of the marijuana and took him to the police station. There, he was interviewed by homicide

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[1] Appellant's accomplices were tried separately and are not parties to this appeal.

[2] Because the missing mirror permitted a traffic stop (*People v. Webster* (1991) 54 Cal.3d 411, 430), it is irrelevant whether that infraction was the officers' true subjective motivation for the stop or merely, as appellant asserts, a pretext. (*Arkansas v. Sullivan* (2001) __ U.S. __ [121 S.Ct. 1876]; *Whren v. United States* (1996) 517 U.S. 806, 812-813; *People v. Miranda* (1993) 17 Cal.App.4th 917, 924.)

detectives, and he eventually provided a detailed confession. In a later inventory search of the car, police found a gun in the trunk. They later determined it was not the one used in the murder.

[The portion of this opinion that follows is deleted from publication.]

A. Physical Evidence

Appellant contends that the court erred in denying his motion to suppress evidence seized from his vehicle. However, we find that appellant consented to the search, making it lawful. (*Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 222 [consent makes search lawful]; *People v. Memro* (1995) 11 Cal.4th 786, 847 [same].)

Appellant, who does not challenge the voluntariness of his consent, contends he only agreed to police searching for drugs, not weapons, thus rendering their search of his trunk for the gun beyond the scope of his consent. (See *People v. Crenshaw* (1992) 9 Cal.App.4th 1403, 1408 [search may not exceed scope of consent].) His claim fails because the court found appellant did not so limit his consent, a factual finding that binds us. (*Ibid*.) In any event, even if appellant had wanted to confine the scope of the search, his desire to restrain the police was ineffective because the smell of marijuana gave them probable cause to search his car. (*People v. Coleman* (1991) 229 Cal.App.3d 321, 326-327; *People v. Soberanes* (1979) 97 Cal.App.3d Supp. 21, 27.)

[The portion of this opinion that follows is to be published.]

B. Confession

Appellant moved to suppress his confession on the ground that it was the product of an illegal arrest. He maintained that the offense of possessing less than 28.5 grams of marijuana did not permit a custodial arrest, and that therefore the subsequent confession must be suppressed. The trial court denied the motion. We find the ruling correct.

Under California law, mere possession or transportation of less than 28.5 grams of marijuana other than concentrated cannabis is a misdemeanor offense punishable by a fine of not more than one hundred dollars. (Health & Saf. Code, §§ 11357, subd. (b)

[possession], 11360, subd. (b) [transportation].) Moreover, as to each such offense, the applicable statute provides in identical terms: "In any case in which a person is arrested for a violation of this subdivision and does not demand to be taken before a magistrate, such person *shall be released by the arresting officer upon presentation of satisfactory evidence of identity and giving his written promise to appear in court*, as provided in Section 853.6 of the Penal Code, and shall not be subjected to booking." (Health & Saf. Code, §§ 11357, subd. (b), 11360, subd. (b), italics added; see *People v. Coleman, supra*, 229 Cal.App.3d at pp. 326-327.) In this case, appellant testified at the suppression hearing that he possessed five grams of marijuana. The People offered no contrary evidence.

For purposes of our discussion, therefore, we will simply assume that the police violated California law by making a full custodial arrest of appellant, and that no other ground for the arrest existed. Nonetheless, the assumption that the arrest violated California law is irrelevant in determining whether appellant's subsequent confession was admissible. That question turns not on the California statutes, but on the scope of Fourth Amendment protections. (*In re Lance W.* (1985) 37 Cal.3d 873, 886-887 [seized evidence not inadmissible except to the extent required by federal Constitution]; *People v. Donaldson* (1995) 36 Cal.App.4th 532, 539 [warrantless misdemeanor arrest in violation of Penal Code section 836, subdivision (a)(1) did not require suppression of evidence]; *People v. Trapane* (1991) 1 Cal.App.4th Supp. 10, 12-14 [same].)

In *Atwater v. City of Lago Vista, supra,* 532 U.S. 318 [121 S.Ct. 1536] (*Atwater*), the United States Supreme Court profoundly limited Fourth Amendment restrictions on the seizure of persons suspected of having committed offenses punishable by only a fine. In that decision, a police officer arrested the plaintiff for violating a Texas statute that required a front seat vehicle passenger both to wear a seatbelt and secure small children riding in the front seat. Texas law classifies these violations as misdemeanors, punishable by only a fine. It also authorizes police officers to arrest persons who violate the statute. The plaintiff in *Atwater* filed a civil rights action, alleging that her arrest for a fine-only offense violated her Fourth Amendment right to be free from unreasonable

seizure. The Supreme Court rejected the claim. "[W]e confirm today what our prior cases have intimated: the standard of probable cause 'applie[s] to all arrests, without the need to "balance" the interests and circumstances involved in particular situations.' [Citation.] If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender." (*Atwater, supra,* 532 U.S. at p. ___ [121 S.Ct. at p. 1557].)

The Court held that the plaintiff's arrest complied with Fourth Amendment standards. As the Court explained in part, the officer had probable cause to believe that the plaintiff had violated the statute in his presence. The officer "was accordingly authorized (not required, but authorized) to make a custodial arrest without balancing costs and benefits or determining whether or not [plaintiff's] arrest was in some sense necessary." (*Atwater, supra,* 532 U.S. at p. ___ [121 S.Ct. at p. 1557].)

After *Atwater*, the court decided *Arkansas v. Sullivan, supra,* __ U.S. ___ [121 S.Ct. 1876] (*Sullivan*). In *Sullivan*, the trial court ruled that a police officer had improperly used the pretext of traffic offenses to stop and search the defendant's vehicle. The Alabama Supreme Court affirmed the trial court's suppression of evidence seized from the vehicle. The Alabama court reasoned that despite the decision in *Whren v. United States, supra,* 517 U.S. 806 (*Whren*), the police officer's improper subjective motivation was a legitimate basis to find a Fourth Amendment violation. The United States Supreme Court reversed, reaffirming the holding of *Whren* that a police officer's subjective motivation is generally irrelevant to a Fourth Amendment analysis. Of importance to the instant case is the Court's brief mention of *Atwater*. The Court cited *Atwater* with the comment, "[W]e note that the Arkansas Supreme Court never questioned [the police officer's] authority to arrest Sullivan for a fine-only traffic violation (speeding), and rightly so." (*Sullivan, supra,* __ U.S. at p. ___ [121 S.Ct. at p. 1878].) Indeed, as the concurrence in *Sullivan* observed, *Atwater* "recognized no constitutional limitation on arrest for a fine-only misdemeanor offense . . . ." (*Id.* at p. ___ (conc. opn. of Ginsburg, J.) [121 S.Ct. at p. 1879].)

Thus, the holding of *Atwater* is simple enough -- the arrest of a person for a minor offense punishable by only a fine does not violate the Fourth Amendment. The implications of this holding, however, are far more complex. These implications, drawn from companion Fourth Amendment principles, are summarized in the *Atwater* dissent of Justice O'Connor: "Under today's holding, when a police officer has probable cause to believe that a fine-only misdemeanor offense has occurred, that officer may stop the suspect, issue a citation, and let the person continue on her way. [Citation.] Or, if a traffic violation, the officer may stop the car, arrest the driver [citation], search the driver, see *United States v. Robinson* [(1973) 414 U.S. 218, 235], search the entire compartment of the car including any purse or package inside, see *New York v. Belton* [(1981) 453 U.S. 454, 460], and impound the car and inventory all of its contents, see *Colorado v. Bertine* [(1987) 479 U.S. 367, 374]; *Florida v. Wells* [(1990) 495 U.S. 1, 4-5]. Although the Fourth Amendment expressly requires that the latter course be a reasonable and proportional response to the circumstances of the offense, the majority gives officers unfettered discretion to choose that course without articulating a single reason why such action is appropriate." (*Atwater, supra,* 532 U.S. at p. ___ (dis. opn. of O'Connor, J.) [121 S.Ct. at p. 1567].) Further, "[t]he arrestee may be detained for up to 48 hours without having a magistrate determine whether there in fact was probable cause for the arrest." (*Id.* at p. ___ [121 S.Ct. at p. 1563].)

In the instant case, at the very least the police had probable cause to believe that appellant committed the fine-only misdemeanor offenses of possession and transportation of less than 28.5 grams of marijuana. Thus, under *Atwater* the Fourth Amendment did not prohibit making a custodial arrest and transporting appellant to the police station. Even if the arrest violated the relevant California statutory provisions, his subsequent confession could not be suppressed on that ground. Rather, since the arrest met Fourth Amendment standards, California law created no basis for suppression. (*In re Lance W., supra,* 37 Cal.3d at pp. 886-887; *People v. Donaldson, supra,* 36 Cal.App.4th at p. 539; *People v. Trapane, supra,* 1 Cal.App.4th Supp. at p. 14.)

[The portions of this opinion that follow are deleted from publication.]

2. Motion in Limine to Exclude Confession for Miranda Violations

When appellant was handed over to detectives for questioning, they did not yet consider him a suspect and therefore did not advise him of his rights under *Miranda v. Arizona* (1966) 384 U.S. 436. Over the next five and one-half hours, the detectives asked appellant what, if anything, he knew or had "heard on the street" about the robberies and murder. Initially, he denied any involvement or knowledge of the crimes. But, as the evening wore on, the detectives told him one of the perpetrators wore glasses, as did he. They also pressed him about the source of two $100 bills found on him and the ownership of jewelry he was wearing. Appellant became visibly nervous, saying he risked his life if he said anything. The detectives understood him to mean he had witnessed, but not participated in, the crimes. They assured him the police could protect him if he provided any information. He then volunteered he had been a lookout during the robberies and murder.

The detectives stopped their questioning and advised appellant of his *Miranda* rights. They also gave him a form stating those rights that he read aloud and signed. He then confessed to the robberies and murder, providing an 80-minute tape-recorded recounting of the crimes.

At trial, appellant filed a motion in limine to exclude everything he said to the detectives. The court denied the motion. Appellant contends the court erred. We disagree.

A. Pre-*Miranda* Statements

Appellant asserts his statements to the detectives before he was advised of his rights should be barred as being taken in violation of *Miranda*. Under *Miranda*, police must inform a defendant in custody of his right to remain silent and his right to counsel before being interrogated. (*Miranda, supra,* 384 U.S. at pp. 442-445.) Interrogation is any questioning which police should know is reasonably likely to elicit an incriminating

response from the defendant. (*People v. Mayfield* (1997) 14 Cal.4th 668, 758; *People v. Mickey* (1991) 54 Cal.3d 612, 648.) A defendant is in custody when he is deprived of his freedom in any significant way. (*People v. Mickey, supra,* 54 Cal.3d at p. 648.)

The detectives testified they did not *Mirandize* appellant at the beginning of the interview because they did not view him as a suspect, and thus their questioning of him was not a custodial interrogation. Consistent with that, he was not in handcuffs during the interview, which took place in the missing persons office with views of the street outside, instead of a windowless interrogation room. (*Oregon v. Mathiason* (1977) 429 U.S. 492, 495; *People v. Boyer* (1989) 48 Cal.3d 247, 272 disapproved on another point in *People v. Stansbury* (1995) 9 Cal.4th 824, 830 n.1 [questioning in police station not necessarily custodial interrogation].) Appellant never asked to end the interview, and addressed the detectives, who were not in uniform, by their first names. Most of their conversation was about Buckner and details of the crime that appellant had heard on the street. (*Arizona v. Mauro* (1987) 481 U.S. 520, 528-529 [not necessarily custodial interrogation merely because there was "possibility" defendant might incriminate himself].) When almost six hours into the interview the detectives began to view appellant as a suspect, they advised him of his rights. The trial court found the detectives were credible, a finding we must accept. (*People v. Whitson* (1998) 17 Cal.4th 229, 248.) But even assuming the police should have *Mirandized* appellant earlier, their mistake does not require reversal because appellant cites nothing in the record showing that his pre-*Miranda* statements were introduced at trial.

B. Post-*Miranda* Statements

Appellant contends his post-*Miranda* confession should be excluded because his waiver of his rights was not voluntary, knowing, and intelligent. (*Oregon v. Elstad* (1985) 470 U.S. 298, 314-317 [waiver of *Miranda* rights must be voluntary, knowing, and intelligent].) To support his contention, he cites the totality of the circumstances surrounding his confession, particularly the late hour and purportedly undue psychological pressure. (*Fare v. Michael C.* (1979) 442 U.S. 707, 724-725, 727-728

[effectiveness of *Miranda* waiver based on totality of circumstances].) He notes it was near midnight when he confessed. He claims the detectives told him he was the only one of the four perpetrators who had any chance of escaping certain doom because the others were "going to fry." He also claims the detectives promised to tell the district attorney he had been truthful if he confessed and told him he had "a chance to testify at trial,"[3] although he admits they never promised him leniency or a specific legal result. Finally, he claims the detectives threatened to arrest his mother for the gun found in his car unless he explained its origin.

The trial court listened to appellant's tape-recorded confession. It found the confession was "very calm," exhibiting a "non-intimidating situation in a conversational tone." The court noted that unlike many confessions, appellant's consisted largely of his retelling events, instead of the typical pattern of detectives describing the crime and asking for a criminal suspect's one or two word assent to the description. Finally, the court rejected as not credible appellant's claim that the detectives threatened to arrest his mother if he did not confess. The court's finding that appellant's waiver was voluntary, knowing, and intelligent was thus supported by substantial evidence. (*People v. Bradford* (1997) 14 Cal.4th 1005, 1032-1033.) We therefore see no error.

3. CALJIC No. 17.41.1

The court instructed the jury with CALJIC No. 17.41.1. That instruction states, "The integrity of a trial requires that jurors, at all times during their deliberations, conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide

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[3] What appellant understood the detectives to mean by assuring him, as he put it, the "chance to testify at trial" is unclear because such a choice was not for the detectives to make, it being solely the prerogative of appellant and his defense counsel.

the case based on penalty or punishment, or any other improper basis, it is the obligation of the other jurors to immediately advise the Court of the situation."[4]

Appellant contends the instruction is unconstitutional because it deprives him of his right to a unanimous jury. He also contends it violates Evidence Code provisions guaranteeing the inviolate privacy of a juror's mental processes by inviting jurors to single out unpopular or holdout voters for removal. Finally, he contends it intrudes on the jury's power (albeit not the right) of jury nullification. Appellant did not, however, object to the instruction, thus waiving his contentions. (*People v. Guiuan* (1998) 18 Cal.4th 558, 570.)

Even if appellant's contentions are preserved on appeal, they are unavailing because the instruction correctly states the law that the jurors are under a duty to follow the trial court's instructions. (See *People v. Daniels* (1991) 52 Cal.3d 815, 865.) The California Supreme Court has recently reaffirmed the trial court's authority to discharge a juror who refuses to follow the court's instruction. (*People v. Williams* (2001) 25 Cal.4th 441, 463.) Although the propriety of CALJIC No. 17.41.1 was not directly in issue, the court's decision leaves little doubt that the instruction is proper. The court specifically rejected the argument that the court should not instruct the jury not to nullify the law. "A jury that disregards the law and, instead, reaches a verdict based upon the personal views and beliefs of the jurors violates one of our nation's most basic precepts: that we are 'a government of laws and not men.'" (*Id.* at p. 459.) We believe that CALJIC No. 17.41.1 is neutral in its language, and serves the interests of both the prosecution and the defense by preventing improper considerations from influencing the jury. We find no basis for ruling it improper.

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[4] The propriety of this instruction is currently under review by the California Supreme Court in *People v. Engelman* (2000) 77 Cal.App.4th 1297, review granted April 26, 2000 (S086462), *People v. Taylor* (2000) 80 Cal.App.4th 804, review granted August 23, 2000 (S088909), and *People v. Morgan* (2000) 85 Cal.App.4th 34, review granted March 14, 2001 (S094101).

In any event, the court's error, if any, in instructing with CALJIC No. 17.41.1 was harmless. (*People v. Molina* (2000) 82 Cal.App.4th 1329, 1335 [CALJIC No. 17.41.1 reviewed for harmless error].) The jurors began deliberating at 2:10 p.m. on the day the case was submitted to them. At 4:00 p.m., they retired for the weekend. They resumed deliberations the following Monday morning at 9:30 a.m., took a 90-minute lunch break, and ended the day at 4:05 p.m. They resumed deliberations at 9:30 a.m. the following morning and at 11:00 a.m. announced they had reached their verdict. During the approximately eight-and-a-half hours the jurors deliberated, nothing in the record indicates there were any holdouts among them, nor were there any complaints by any juror to any court official or any sign of deadlock. In short, nothing in the record suggests CALJIC No. 17.41.1 affected the jury's verdict. (See *id*. at pp. 1335-1336 [assuming CALJIC No. 17.41.1 was error, it was harmless where jury deliberated for less than an hour with no evidence of deadlock or holdout jurors and no communication from jury to court].)

4. Concurrent Sentences for Robbery of Murder Victim and for Conspiracy

Appellant asserts, and respondent agrees, that the court erred in imposing concurrent sentences for (1) robbing Gary Kim, the murder victim, and (2) conspiracy to commit robbery. Both appellant and respondent agree the court instead should have stayed the sentences. The court erred in imposing a concurrent sentence for robbing Kim because the robbery was the basis of appellant's conviction for first degree murder of Kim under the felony-murder rule. Such dual use of the robbery was improper. (*People v. Boyd* (1990) 222 Cal.App.3d 541, 575-576 [defendant cannot be sentenced for both first degree murder and robbery when it is solely the robbery that elevates the murder to the first degree].) The court also erred in imposing a concurrent sentence for conspiracy to commit robbery because he was also sentenced for robbery, and one cannot be punished for both conspiring to commit a crime and for committing the crime. (*In re Cruz* (1966) 64 Cal.2d 178, 180-181.)

We shall order that appellant's sentence be corrected.

[The remainder of this opinion is to be published.]

DISPOSITION

The clerk of the superior court is directed to amend the abstract of judgment to reflect that the sentences for count 2 (robbery of Gary Kim) and count 6 (conspiracy to commit robbery) are stayed under Penal Code section 654 and to forward a corrected abstract of judgment to the Department of Corrections. In all other respects, the judgment is affirmed.

CERTIFIED FOR PARTIAL PUBLICATION.

WILLHITE, J.*

We concur:

GRIGNON, Acting P.J.

ARMSTRONG, J.

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* Judge of the Los Angeles County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.